Filed 2/25/16 L.R. v. Superior Court CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

L.R., a Minor, etc., et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LITTLE SCHOLARS, INC., Real Party in Interest.	B266752 (Los Angeles County Super. Ct. No. BC574915) OPINION AND ORDER GRANTING PEREMPTORY WRIT OF MANDATE

ORIGINAL PROCEEDINGS in mandate. Howard L. Halm, Judge. Petition granted.

Taylor & Ring, David M. Ring, Robert R. Clayton; Esner, Chang & Boyer, Holly N. Boyer and Shea S. Murphy for Petitioners.

No appearance for Respondent.

Beach Cowdrey Owen, Thomas E. Beach and Darryl C. Hottinger for Real Party in Interest.

Petitioners L.R., G.M., A.L., J.S., and K.S., minors complaining by and through their guardians ad litem (in each case, a parent), and each of the parents individually (together, Families) seek review of the order of respondent court requiring Families to arbitrate claims against their former child care provider, brought as a result of physical abuse of the minors. We conclude that the agreement to arbitrate, even if valid and applicable to all parties, does not contemplate an agreement to arbitrate claims arising from physical abuse of the children. Accordingly, we grant the petition.

BACKGROUND

The underlying case arises from the treatment of five children who were enrolled in the daycare at the Tutor Time Child Care Learning Center, which is a franchise owned by real party in interest Little Scholars, Inc. (LSI), in 2013 and 2014. Families allege that two employees of Tutor Time, Jessica Morales and Rosa Nepomuseno, physically abused each of the toddlers, then two or three years old, by sticking pushpins in their legs, in an action they called "pica pica." "If a boy was deemed inattentive or failed to follow directions, these teachers would stick a push pin into the child's legs." Families allege that other Tutor Time employees witnessed the practice and failed to report the abuse to their supervisors or to child protective services, and did not inform Families about the abuse of the toddlers.

When another employee finally reported the abuse to a supervisor, Families allege that Tutor Time fired the employees but did not report the incidents to child protective services. Families allege that "when the Department of Social Services eventually learned of the abuse, it conducted an investigation; and it determined that serious 'Class A' violations had occurred," but that Tutor Time did not inform Families, resulting in a delay in the children receiving treatment and counseling.

On March 9, 2015, Families filed an action against LSI, setting forth causes of action for negligence; negligent hiring, supervision, and retention; breach of mandatory duty/failure to report child abuse; assault and battery; negligent and intentional infliction of emotional distress; and breach of contract.

On June 18, 2015, LSI filed a petition to compel arbitration. LSI alleges that each of the parents of the minor plaintiffs filled out an admission package upon their admission to Tutor Time. The one-page "schedule of fees" that each parent signed included an arbitration provision that stated: "I, the parent of _____ have read the above tuition responsibility agreement which shall become part of my obligation to the center and I fully understand this obligation. I further agree to arbitrate any disputes that may arise from the care of my child(ren) with your facility in accordance with the rules of the American Arbitration Association with the exception of any financial disputes that may occur between the parties." The one-page document was accompanied by a 40-page admissions packet and a 12-page "enrollment and policy agreement."

Among other arguments, Families contend that the arbitration clause is unenforceable because it did not contemplate an agreement to arbitrate claims stemming from physical abuse of their children.[1]

DISCUSSION

Code of Civil Procedure section 1281.2 provides that if a written agreement to arbitrate a controversy exists and a party thereto refuses to arbitrate the controversy, "the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner;[or] [¶] (b) Grounds exist for the revocation of the agreement." (Code Civ. Proc., § 1281.2, subds. (a)–(b).) California law favors arbitration as a speedy, inexpensive means of resolving disputes. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1204.)

Parties, however, are required to arbitrate only those issues they agreed to arbitrate. "[T]he terms of the specific arbitration clause under consideration must reasonably cover the dispute as to which arbitration is requested. This is so because

---

[1] As a result of our holding, we do not address the other arguments raised in the petition or the order. Accordingly, petitioners' request for judicial notice is denied.

'[t]here is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate.' [Citations] [¶] Indeed, this principle is effectively prescribed by Civil Code section 1648, which provides: 'However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.'" (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1063.) Families contend that they would not have contemplated that "care of their children" would include physical abuse of the children.

In opposition to the motion to compel arbitration, Families contended that the holding in *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 745 (*Victoria*), supports their argument that their claims are not within the scope of the agreement to arbitrate. In *Victoria*, an orderly employed by a hospital repeatedly sexually assaulted a patient recovering from brain surgery. (*Id.* at p. 737.) The patient sued the hospital for negligent infliction of emotional distress and negligent selection, employment, retention, and supervision of the employee who committed the alleged assaults. (*Ibid*.) The hospital moved to compel arbitration, citing a provision that stated: "'Any claim arising from alleged violation of a legal duty incident to this Agreement shall be submitted to binding arbitration if the claim is asserted: (1) by a [patient] . . .[;] (2) On account of death, mental disturbance or bodily injury *arising from rendition or failure to render services under this Agreement,* irrespective of the legal theory upon which the claim is asserted . . . .'" (*Id*. at p. 738) The *Victoria* court concluded that "the employee's alleged misconduct was entirely outside the scope of his employment. It had nothing to do with providing, or failing to provide, services. He is not accused of negligently failing to empty a bedpan. He is accused of the sexual assault and rape of petitioner. [¶] Surely it was not contemplated, let alone expected, by either party to the Agreement that this sort of attack would befall petitioner while she was hospitalized under Kaiser's care. It is, therefore, difficult to conclude that the parties intended and *agreed* that causes of action arising from such an attack would be within the scope of the arbitration clause." (*Victoria*, *supra*, at p. 745.)

The superior court disagreed with Families, concluding that unlike the arbitration provision in *Victoria,* the arbitration provision in this matter is unambiguous. The court applied the language stating that "I further agree to arbitrate any disputes that may arise from the care of my child(ren) with your facility in accordance with the rules of the American Arbitration Association with the exception of any financial disputes that may occur between the parties," to mean that any dispute that is not a financial dispute is arbitrable and that the claims "are subject to the Arbitration Agreements because they arise out of a dispute regarding the care of the Minor Plaintiffs while they were in the Program, which is within the scope of the Arbitration Agreements." The order granting the motion to compel arbitration describes the complaint as alleging that the "Minor Plaintiffs sustained physical and emotional injuries while they were enrolled in the Program." This description, however, does not address the allegations that employees of the facility intentionally caused the injuries.

LSI argues that Families have never claimed that they did not see the arbitration provision or that they were unaware of it, or that they did not read it, or that they did not understand the document when they signed it. LSI asserts that this case departs from *Victoria* because "the conduct in *Victoria* was clearly not encompassed within the specific definitions set forth in the arbitration agreement." With respect to Families' argument that the holding in *Victoria* applies to the facts in this case, LSI alleges that the abuse of the toddler boys by sticking them with pushpins falls within the category of "care" of the children. Describing the conduct as "a form of discipline," LSI argues that "a teacher's response to improper or unruly behavior is conduct which arises out of the care of the children at the facility. Therefore, it is encompassed within the arbitration agreement."

The provision requiring arbitration is limited to "any disputes that may arise from the care of my child(ren) with your facility," and specifically excludes financial disputes. What falls within the category of "care of my child(ren)" is not defined in the agreement. LSI asserts that Families have not provided evidence addressing "what types of claims [Families] allegedly anticipated would be encompassed within the arbitration agreement."

"If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (Civ. Code, § 1649.) The question, then, is whether Families, in signing an arbitration provision agreeing to arbitrate "any disputes that may arise from the care of my child(ren) with your facility," understood that the provision would cover conduct rising to the level of physical abuse. Like the petitioner in *Victoria*, Families argue that a parent would not anticipate that claims for corporal punishment of their children would fall within the arbitration provision. LSI urges us to distinguish *Victoria* "because it does not concern conduct which, as a matter of law, is outside the course and scope of the employee's employment." LSI argues that "[t]he severity of the conduct is not the issue. If the teachers responded to the children by making them sit in a timeout, that conduct would arise out of the care of the children at the facility and be encompassed within the arbitration agreement. If the teachers responded to the children by yelling at the children, that conduct would arise out of the care of the children at the facility and be encompassed within the arbitration agreement. In the present case, some of the teachers responded to the children by poking them with push pins. Once again, [LSI] is not trying to defend that conduct, but it was a form of discipline in response to improper behavior by the children. As such, it arose out of the care of the children at the facility and was encompassed within the arbitration agreement."

Contrary to LSI's assertion, however, the conduct described in the complaint is, in fact, prohibited discipline by a child care center as a matter of law. California regulations governing the operation of licensed child care centers preclude the use of "[a]ny form of discipline or punishment that violates a child's personal rights as specified in Section 101223." (Cal. Code Regs., tit. 22, § 101223.2.) Among the types of discipline prohibited by section 101223 are "corporal or unusual punishment" and "infliction of pain." (Cal. Code Regs., tit. 22, § 101223.) Further, the admission packets include a statement that "[a]s a parent, I can always expect the center to adhere to all county and state rules regarding safety, fire, nutrition, and child/staff ratios." As a result, Families' contention that the agreement does not give rise to an expectation that they

would be required to arbitrate claims arising from physical abuse of their toddler children has merit, bringing this agreement within the holding of *Victoria*.

As in *Victoria*, in this case "[s]urely it was not contemplated, let alone expected, by either party to the Agreement that this sort of attack would befall petitioner" while under the care of the facility. "It is, therefore, difficult to conclude that the parties intended and *agreed* that causes of action arising from such an attack would be within the scope of the arbitration clause." (40 Cal.3d at p. 745.)

Because the language in the arbitration agreement does not give rise to a conclusion that the parties intended and agreed that a claim stemming from physical abuse of the plaintiff toddler boys will be subject to arbitration, we grant the petition.

DISPOSITION

The order granting the motion to compel arbitration is vacated and the superior court shall enter a new and different order denying the motion. Petitioners shall recover their costs related to this proceeding.

NOT TO BE PUBLISHED.

THE COURT*

*CHANEY, Acting P. J.	JOHNSON, J.	LUI, J.